IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1467

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner South Park Independent School District respectfully prays that a writ of certiorari issue from this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 566 F. 2d 1221. It is reproduced as Appendix A hereto. The orders of the District Court for the Eastern District of Texas, not reported, are reproduced as Appendices B and C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1978. A timely petition for rehearing or rehearing *en banc* was denied on February 23, 1978, and

this petition was filed within ninety days of that date. On March 22, 1978, the Court of Appeals granted motion to recall and stay its mandate pending presentation of this petition prior to and including April 17, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Notice of appeal has been timely filed.

QUESTIONS PRESENTED

I.

Whether a school district that has fully complied with a court-ordered plan requiring establishment of a unitary school system may, absent the finding of a further constitutional violation, nonetheless later be constitutionally required to adopt a different plan in order to increase school racial balance.

II.

Whether the provision of the Equal Educational Opportunity Act of 1974 that no order shall be entered, as a remedy for a denial of equal educational opportunity or for denial of equal protection of the laws, requiring enforcement of a desegregation plan or modification of a court-approved plan, until the school district has been provided notice of the details of the violation, may be complied with by a notice to the school district that, in effect, states no more than that some racially imbalanced schools continue to exist.

STATEMENT OF THE CASE

1. Factual and Procedural Background

Petitioner South Park Independent School District encompasses a densely populated area that includes part of the City of Beaumont, Texas, and an adjoining area.

In 1970, when this litigation began, the school district operated twenty schools (three high schools, four junior high schools, and thirteen elementary schools) with over 13,000 students, of whom approximately 33 percent were black. R. Vol. I p. 12. Since that time, enrollment has steadily declined to fewer than 12,000 students, approximately 40 percent of whom are black. R. Vol. I p. 127-128.

The Attorney General of the United States began this action in 1970 by filing a complaint pursuant to the 1964 Civil Rights Act (42 U.S.C. § 2000c-6(a) and (b)). At that time the school district was operating pursuant to a freedom of choice plan. After a hearing and the submission of desegregation plans by the parties, the district court on August 31, 1970 entered an order for "the immediate implementation of a school integration plan designed to establish a unitary school system in the South Park Independent School District." App. C p. 1. The court substantially adopted the neighborhood school plan submitted by the school district, with certain modifications designed to increase integration.

The district court's order specifically set forth the required attendance zone boundaries for each of the school district's schools. As an exception to neighborhood assignment, the court required the school district to adopt and implement a majority-to-minority transfer policy, allowing free student transfers where the effect would be to increase integration, with the required transportation to be provided by the school district whenever necessary and with space to be made available to transferring students on a priority basis.

The court also ordered the school district to assign faculty and staff so that "the ratios of black to white teachers and staff in each district school are substantially the same as the present district-wide ratio of faculty and

staff, allowing a five (5%) percent tolerance factor." App. C, p. 10. In the event that special certification requirements at the high school level make attainment of these ratios impossible with the present faculty, the school district was required, "in the course of employing new teachers during the school year [to] act so as to correct any deviations presently existing with respect to such ratio. *Id.*

This order became final upon the failure of either party to make an appeal. The district court did not retain jurisdiction.

Almost six years later by letter of April 15, 1976, the Civil Rights Division of the Department of Justice advised the school district that it "believe[d] that additional steps need to be taken in order to bring the district into compliance with federal law." R. Vol. I p. 103. The basis for this belief was stated to be that "Information presently available to this office indicates that the desegregation anticipated under the court order has not materialized, and that in fact there are now six schools in the district which are over 85% black. In addition, there are presently six public schools in the system which enroll over 90% white students." R. Vol. I p. 104. The school district was asked to advise within fifteen days as to "what steps the school board is willing to take to eliminate the racial indentifiability of the above mentioned schools by the beginning of the 1976-77 school year." R. Vol. I p. 105.

This was the first indication by any agency of the United States of any dissatisfaction with the operations of the school district since 1970. For each academic year since 1970, the Department of Health, Education, and Welfare has certified that the school district was operating in compliance with the requirements of the 1964 Civil Rights Act. App. B, p. 7.

By letter of June 24, 1976, the school district replied that it had operated and was operating in full compliance with the district court's 1970 order. R. Vol. I, p. 107. The school district further advised the government that it had, nonetheless, made a preliminary study of alternate means of increasing integration and concluded that no alternate plan could be fully considered and implemented "in the brief time remaining without seriously disrupting the district's educational program for the academic school year 1976-1977." R. Vol. I, p. 108. The school district also set forth a schedule it had adopted for further consideration of the matter and for decision by February 1977 on the feasibility of an alternate plan to be implemented in the 1977-1978 school year. R. Vol. I pp. 109-110.

Without replying to the school district's letter, in July, 1976, the government filed a "Motion for Supplementary Relief" in the district court, requesting "an order requiring the South Park Independent School District to develop, adopt and implement a comprehensive school desegregation plan which fully satisfies the requirements of the United States Constitution" to be "implemented by the beginning of the 1976-77 school year." R. Vol. I, p. 75.

The government did not allege that the school district was not in full compliance with the district court's 1970 order or that the government had received any complaint from any student or parent in the school district regarding the school district's operation. Instead, the government relied solely on a statistical showing of school racial imbalance. R. Vol. I pp. 78-82. After presenting its statistical tabulations, the government's brief in support of its motion stated: "In summary these statistics indicate that while the student enrollment is about 60% white and 40% black, 75% of the white students attend schools which are at least 89% white and 76% of the black students attend schools which are at least 85% black." R. Vol. I p. 82.

The school district filed a reply, with memorandum of authorities, to the government's motion urging the district court to deny it in all respects on the grounds, among others, that the school district was in full compliance with the court's 1970 order; that the government's motion was not based on current information; and that to the extent that the integrative effects of the court's order differed in any way from those expected in 1970, it was the result of population movements beyond the control of the school district. R. Vol. I. pp. 88-102. A motion to intervene was filed by a group of parents and students in the school district, also urging that the government's motion be denied. R. Vol. I, pp. 115-117.

A hearing was held on August 16, 1976 at which the district court granted the government permission to file an amended motion. On August 17, 1976 the government filed an amended motion for supplementary relief and a memorandum in opposition to the motion to intervene. The amended motion was substantially identical to the original motion except that it incorporated current enrollment statistics and that it now asked that a new plan be implemented at the beginning of the 1977 spring term instead of at the beginning of the 1976 fall term. A further hearing was held on August 19, 1976, at which only the school district offered the testimony of witnesses, and on September 9, 1976 the district court entered its opinion and order, with findings and conclusions, denying the government's motion. App. B.

The court granted the motion to intervene for the purposes of any appeal. R. Vol. II, p. 128.

2. The District Court's Opinion

The district court denied the government's motion for supplementary relief on two grounds. The court found that the school district "has fully complied with this Court's

order of August 31, 1970, from date of entry to the present" (App. B, p. 7), and that the government "has failed to establish that the integration order entered by this Court on August 31, 1970, is constitutionally flawed." App. B, p. 9. The court noted that "the Department of Health, Education and Welfare, an agency of plaintiff charged with such responsibility, has approved student integration procedures in defendant district in each academic school year from entry of the Court's order to the present, and, prospectively, for academic school year 1977-78." App. B, p. 7.

The court further found:

> While specific desegregative effects anticipated at the time of entry of the Court's order in August 1970 may not have been fully realized, nonetheless, the overall, district-wide desegregative effects of that order have been greater than were anticipated. The desegregative results differing from those anticipated in 1970 have been the result of shifting residential patterns, attendance of some district students at private schools, and other factors beyond the control of defendant. . . .

App. B, p. 7. Finally, the district court found:

> Since entry of this Court's order of August 31, 1970, defendant district has taken no affirmative action with segregative intent, nor has it deliberately refrained from taking any affirmative action within the scope of such order which, if taken, would have increased desegregative results. Student assignments to individual classes at South Park High School and in the other schools of defendant district have consistently been made without regard to race, color or national origin, and the method of student class assignment employed by defendant has had a definite desegregative effect.

App. B, p. 7-8.

The district court also denied the government's motion for supplementary relief on the ground that the government had failed to comply with the notice requirement of Section 259 of the Equal Educational Opportunity Act of 1974. 20 U.S.C. § 1758. Section 259 prohibits federal courts from ordering modification of a court-approved desegregation plan until the school district has been provided notice of the details of a violation of equal educational opportunity or of denial of the equal protection of the laws and given an opportunity to develop a voluntary plan, and time to permit community participation in the development of a new plan. The court held:

> Plaintiff has failed to satisfy the requirements of 20 U.S.C.A. 1758 with respect to providing notice to defendant district of the details of any violation of equal educational opportunity or of equal protection of law. Thus, defendant has not been given a reasonable opportunity to develop a voluntary remedial integration plan with time for community participation therein. Accordingly, this Court is prohibited under the provisions of 20 U.S.C.A. 1758 from granting plaintiff's motion for supplementary relief.

App. B, pp. 8-9.

3. The Court of Appeals' Opinion

On appeal by the government, the Court of Appeals for the Fifth Circuit reversed the district court's decision. The court of appeals found that "at no time prior to the 1976 order presently under attack, had a finding been made by the district court as to the attainment of a 'unitary' system by the SPISD," and that "given these circumstances, the parties are bound by the intervening opinions of the Court of Appeals and the United States Supreme Court" which, the court believed, outlined "new guidelines and requirements" for school desegregation cases. App. A, p. 5.

The court of appeals specifically referred to this Court's decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). App. A, p. 5. Under that decision, the court of appeals held, the "existence of one-race schools" made it "necessary to remand this case to the district court for supplemental findings of fact in order to determine whether or not the SPISD is in fact a 'unitary' school system." App. A, p. ...

The court of appeals also held that Section 259 of the Equal Educational Opportunity Act of 1974 (20 U.S.C. 1758) "is not controlling," because "No judicial ruling had been made concerning the attainment of a 'unitary' system." App. A, p. 6. In any event, the court said, the Department of Justice's letter of April 15, 1976 complied with the notice requirement of Section 259 because that letter advised that "the Department felt additional steps were necessary to bring the district into compliance with federal law," "pointed out . . . that the one-race or predominately one-race, status of twelve of the district's schools was the primary concern of the government," and "explained that the Department of Justice felt that the particular feeder pattern of elementary to junior high to senior high schools used by the school district was the chief cause for these one-race schools." App. A, p. 6. The court of appeals, therefore, was "unable to see how the government could have better complied with the notice provisions of the statute." App. A, p. 6.

On appeal, the government did not challenge the district court's ruling that the school district's assignment of students to classrooms was not racially discriminatory, and this, therefore, is no longer an issue in this case.

Finally, the court of appeals held that the district court on remand should make "specific findings of facts, if such exist, supporting the court's conclusion that the reassign-

ment of principals was done without regard to the race of the individuals involved." App. A, p. 7. The school district believes that the district court's conclusion is correct and supported by evidence, but it does not wish to raise any issue in this petition as to that matter.

REASONS FOR GRANTING THE WRIT

This case presents in unusually clear-cut form a constitutional question of the greatest importance to school districts across the nation operating pursuant to court-ordered desegregation plans: whether they, despite full compliance with a court-ordered plan and the absence of any constitutional violation since the date of the order, must submit to periodic demands for restructuring in order to achieve a greater degree of school racial balance and overcome the effects of residential racial concentration; population movements; the withdrawal of students; and other factors beyond the power of school authorities to control. The decision of the Court of Appeals for the Fifth Circuit on this question is in direct conflict with the applicable decisions of this Court.

This case also presents an important question of federal statutory law that was almost certainly decided wrongly by the court of appeals and that, as a case of first impression, requires resolution by this Court: the meaning of a major provision of the Equal Educational Opportunity Act of 1974, Congress' principal attempt to provide guidance on desegregation issues of overwhelming national concern. According to the court of appeals' interpretation, a provision of the Act meant to limit or prevent unnecessary, repeated upheaval of school districts was found to have little or no more effect than if it had never been enacted. Grant of this petition for certiorari is strongly supported, therefore, by considerations referred to in Rule 19 of this Court.

I. Having Fully Complied with a Court-Ordered Desegregation Plan Requiring a Unitary System, the School District Cannot Constitutionally be Required to Adopt a Different Plan in Order to Increase School Racial Balance and Overcome the Effects of Residential Racial Concentration; Population Movements; Student Withdrawals; and Other Factors Beyond the School District's Control.

In 1970 the district court, on suit by the government, ordered the school district to undertake "the immediate implementation of a school integration plan designed to establish a unitary school system in South Park Independent School District." App. C, p. 1. The court order set forth the specifics of the required plan in detail. The government took no appeal from this order, and the district court did not retain jurisdiction.

In the present proceedings, the government did not challenge the district court's finding that the school district "has fully complied with this Court's order of August 31, 1970, from date of entry to the present."* App. B, p. 7.

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* At the August 16, 1976 hearing the following exchange took place:

THE COURT: All right, I would inquire of counsel for the Government whether or not you are making the contention that the School District in some way has failed to comply with the Court's order of August 31, 1970.

MR. JENNINGS [government counsel]: No, sir, we are not contending that they have failed to comply. . . .

THE COURT: Now the Court would inquire — the Court doesn't wish to embarrass counsel, because maybe you had nothing to do with it at the time, but if you feel this way now, at the time you filed the motion, do you know why the Government did not feel that way in 1970, in taking an appeal from the Court's order of August 31, 1970?

MR. JENNINGS: I can't answer that.

THE COURT: You have no answer to that?

Nor did the government challenge the district court's finding that "the overall, district-wide desegregative effects of that order have been greater than were anticipated. App. B, p. 7. The desegregative results differing from those anticipated in 1970 have been the result of shifting residential patterns, attendance of some district students at private schools, and other factors beyond the control of the defendant. . . ." App. B, p. 7.

The government's motion for supplemental relief was based solely on a statistical showing of the continued existence of school racial imbalance and, in particular, of several one-race or predominantly one-race schools. The district court, therefore, denied the government's motion, correctly holding that there is no constitutional basis for requiring the school district to abandon the court-ordered plan it had operated under for six years and adopt a different plan designed further to increase school racial balance. App. B, p. 9-10.

The Court of Appeals for the Fifth Circuit reversed the district court's decision on the ground that:

> "At no time prior to the 1976 order presently under attack, had a finding been made by the district court as to the attainment of a 'unitary' system by the SPISD. Thus, the case remained 'active' under the district court's jurisdiction. Given these circumstances, the parties are bound by intervening opinions of the Court of Appeals and the United States Supreme Court, and there have been many such opinions outlining 'new guidelines and requirements' in certain situations.

App. A, p. 5. The court of appeals held that under this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the district court was

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MR. JENNINGS: No, sir.
R. Vol. II, p. 48-49.

required to make additional findings "demonstrating that [the existence of one-race schools] is not the result of present or past discriminatory action," and the court of appeals, therefore, remanded the case to the district court for "supplemental findings of fact in order to determine whether or not the SPISD is in fact a 'unitary' school system." App. A, p. 5.

The court of appeals clearly erred in holding that the district court had not properly found that the school district had established and maintained a unitary system, and in holding that additional findings were necessary to support the district court's conclusion. Indeed, the district court could not have found that the school district had not achieved a unitary system.

Having ordered the school district in 1970 to implement a specific desegregation plan which the district court had determined would achieve a unitary system, completely extirpating the effects of compulsory segregation; having found full (and unchallenged) compliance by the school district with that order; and having found that overall the plan had more than accomplished the anticipated desegregative effects, the district court had no choice but to hold that a unitary system had been established in 1970, and continued to the present. No further findings were necessary to support that holding. The district court could not have held that the school district had not achieved a unitary system in 1970 except by repudiating its own 1970 order from which no appeal had been taken, and in which jurisdiction was not retained. To have held that the school district had not achieved a unitary system would have been to hold that its own orders may not be relied upon by a school district, and that school desegregation litigation can have no end.

The court of appeals also erred in holding that this Court's decision in *Swann* requires or supports the court of appeals' reversal of the district court's decision. *Swann* did not create any "new requirement" in school desgregation litigation. On the contrary, this Court made explicit in *Swann* that "the objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." 402 U.S. at 15. "The target of the cases from *Brown I* to the present was the dual school system;" the task is the "elimination of racial discrimination in public schools." *Id.* at 22. Most important, this Court emphasized:

> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

Id. at 23. In the present case no pupil has been excluded from any school, directly or indirectly, on account of race, at least since the district court's 1970 order requiring a unitary system, and the "disproportionate racial concentrations in some schools" are not due to racial discrimination by school authorities, and are not alleged to have been. The district court's decision, therefore, far from being inconsistent with it, is fully supported by *Swann.*

That the district court's decision is not inconsistent with but is supported and, indeed, required by *Swann* is further shown by this Court's statement in *Swann:*

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems will then be 'unitary' in the sense required by our decisions in *Green* and *Alexander.*

> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

402 U.S. at 31-32. The point at which a school district has most clearly gained compliance with *Brown I* and achieved a unitary system is, we submit, the point where, as here, it has fully complied with a court-ordered plan requiring and establishing a unitary system. A school district's affirmative duty to desegregate has then surely been accomplished, and federal courts may not thereafter order adjustments in the racial composition of student bodies every six years any more than they may order year-by-year adjustments.

This Court's more recent decision in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976) is to the same effect. In *Pasadena*, as here, unconstitutional school segregation had been found in the past, and in 1970 a plan had been ordered by the district court to achieve a unitary system. After the Pasadena School Board had complied with its order for four years, the district court issued a further order, affirmed by the court of appeals, requiring the school district to adopt a different plan in order to eliminate predominantly black schools. Noting that "we do not have before us any issue as to the validity of the District Court's original judgment," since no appeal had been taken from it, this Court, reversing the court of appeals, held that the district court's further order was not constitutionally required or justified:

> For having once implemented a racially neutral attendance pattern in order to remedy the perceived con-

> stitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

427 U.S. at 436-37. The district court in the present case was obviously correct, therefore, in holding that no new plan of student assignment to increase racial balance could be imposed on the school district in the absence of any allegation or showing that the district court's 1970 order to create a unitary system had not been complied with.

The government's demand for supplementary relief and the court of appeals' reversal of the district court's denial of that relief rests in essence on a misunderstanding or misapplication of the constitutional requirement of school desegregation as stated by this court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), and in every later school desegregation case. *Brown*, of course, held that state-compelled school segregation is constitutionally prohibited.

In *Green* v. *County School Board*, 391 U.S. 430, 439 (1968) school boards were charged with an affirmative duty to eliminate racial discrimination and all of its effects from school systems, to see "that state-imposed segregation has been completely removed." The duty is not to remove, undo, or prevent racial imbalance or the existence of predominantly one-race schools not shown to be the result of racial discrimination by school authorities. As this court stated in *Swann*, there is no "substantive constitutional right [to] any particular degree of racial balance or mixing." 402 U.S. at 24.

In *Milliken* v. *Bradley*, 418 U.S. 717 (1974), this court held that the existence of predominantly black schools in one school district and predominantly white schools in

close proximity in adjacent school districts does not in itself establish a constitutional violation and a constitutional requirement to remove the imbalance. Racially neutral geographic assignment, the decision makes clear, is not constitutionally prohibited merely because racially imbalanced schools result. In *Pasadena*, as already noted, this Court again held that the existence of racial imbalance or of predominantly black schools resulting from residential racial concentration in a formerly unconstitutionally segregated school district does not require or justify a district court order designed to remove that imbalance.

That the court of appeals erred in holding that the continued existence of predominantly black schools may in itself authorize a district court order requiring elimination of such schools is demonstrated, finally, by this Court's recent decision in *Dayton Board of Education* v. *Brinkman*, ... U.S. ....., 97 S.Ct. 2766 (1977), where this Court stated: "It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution. *Spencer* v. *Kugler*, 404 U.S. 1027 (1972); *Swann, supra*, at 24." 97 S.Ct. 2774. The extent and limits of the remedial authority of federal district courts in school desegregation cases was then stated with specificity:

> The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington* v. *Davis*, [426 U.S. 229 (1976)] . . . . If such violations are found, the District Court in the

> first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference and only if there has been a systemwide impact may there be a systemwide remedy.

97 S.Ct. at 2775. In the present case, as in *Dayton*, mandatory segregation has long since ceased, and, pursuant to the district court's 1970 order, a unitary system has long been achieved and maintained. There has been no allegation or showing of any act of racial discrimination by the school district since that order. *Dayton* makes clear that there is, therefore, no basis for a further district court order designed to increase racial balance or eliminate predominantly one-race schools.

In effect, the government is seeking to challenge the validity of the district court's 1970 order, despite its failure to appeal from that order, on the ground that this Court's decisions since 1970 have so changed the law of school desegration that the 1970 order would be invalid if it were only just entered because it does not require the elimination of all predominantly one-race schools. In fact, however, this Court's recent decisions demonstrate that the government's attack on the 1970 order could not be sustained even if that order were now subject to review, and that the government simply misunderstands the desegregation requirement.

As this court stated in *Milliken*, 418 U.S. at 746, the desegration remedy "is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." And in *Dayton*, as just noted, this court

stated with even greater specificity that the duty of a district court in a desegregation case is to determine the incremental segregative effect of the violation found and to require a plan creating the racial distribution in the schools that would have obtained in the absence of that violation; the duty is not simply to create the maximum achievable racial balance or to eliminate predominantly one-race schools not shown to be the result of the violation found.

The government has made no attempt to show and there is no reason to believe that the racial imbalance presently existing in the school district would not exist except for the constitutional violation that was ended with the 1970 order. On the contrary, that racial imbalance is plainly the result of residential racial concentration such as exists everywhere in the nation. As Justice Powell stated in *Keyes* v. *School District No. 1*, Denver, Colorado 413 U.S. 189, 222-23 (1973), (concurring and dissenting opinion), "the familiar root cause of segregated schools in *all* the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns. . . . This is a national, not a southern, phenomenon. And it is largely unrelated to whether a particular State had or did not have segregative school laws."

Justice Powell cited the statement of demographer Dr. Karl Taeuber:

> No elaborate analysis is necessary to conclude from these figures that a high degree of residential segregation based on race is a universal characteristics of American cities. This segregation is found in the cities of the North and West as well as of the South; in large cities as well as small; in nonindustrial cities as well as industrial, in cities with hundreds of thousands of Negro residents as well as those with only a few thousand, and in cities that are progressive in their employment practices and civil rights policies as well as those that are not.

Id. at 223 n. 9. See also *Milliken*, 418 U.S. at 756 n. 2 (concurring opinion); *Austin Independent School District* v. *United States*, 429 U.S. 990, 992 (1977) (concurring opinion); *Bradley* v. *School Board of Richmond, Virginia*, 462 F.2d 1058, 1066 (*en banc*, 4th Cir. 1972), *aff'd by an equally divided court*, 412 U.S. 92 (1973).

Indeed, the district court's 1970 order, gerrymandering school attendance zones to increase integration and requiring that only integration-increasing tranfers be permitted, has undoubtedly resulted in a greater degree of integration — given existing residential patterns — than would exist if there had been no pre-1970 violation. No student or parent in the school district has complained of the school district's operation since its implementation of the 1970 order. In these circumstances, to require a further restructuring of the school district would be to require not desegregation, which has already been accomplished, but simply the achievement of racial balance regardless of residential racial concentration and regardless of individual choices and desires. And the process would be never-ending.

II. The Court of Appeals Erred in Reversing the Finding of the District Court that the Government had Failed to Comply with the Requirements of the Equal Educational Opportunity Act of 1974.

The district court denied the government's motion for supplementary relief on the additional ground that the government had failed to comply with the requirements of the Equal Educational Opportunity Act of 1974, and, therefore, that it lacked jurisdiction to consider the same. As noted, the district court had not retained jurisdiction in 1970. In that Act, Congress' major effort to deal with problems of desegregation and the transportation of children that is usually involved, Congress declared, as a matter of

national policy, that all public school children are "entitled to equal educational opportunity without regard to race," and that "the neighborhood is the appropriate basis for determining public school assignments." 20 U.S.C. § 701. Section 205 of the Act, 20 U.S.C. § 1704 provides:

> The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws.

Section 208, 20 U.S.C. § 1707, provides:

> When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, such school population changes so occurring shall not, per se, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan.

Finally, Section 259, 20 U.S.C. § 1758 provides:

> Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.

The district court found that "Defendant district has not been provided notice of the details of any violation of equal educational opportunity or of equal protection of law, and further that plaintiff has neither alleged nor proved specific instances or examples of denial of these rights to any person by defendant district. Without such notice defendant has not been permitted sufficient opportunity for community participation in the development of a remedial student integration plan as sought by plaintiff. App B, pp. 8-9. The court therefore held:

> Plaintiff has failed to satisfy the requirements of 20 U.S.C.A. 1758 with respect to providing notice to defendant district of the details of any violation of equal educational opportunity or of equal protection of law. Thus, defendant has not been given a reasonable opportunity to develop a voluntary remedial integration plan with time for community participation therein. Accordingly, this Court is prohibited under the provisions of 20 U.S.C.A. 1758 from granting plaintiff's motion for supplementary relief. App. B, pp. 9-10.

The court of appeals reversed the district court's finding and holding as to the Act on the ground that "No judicial ruling had been made concerning the attainment of a 'unitary' system. The case had not been closed. Under the facts of this case, the statute is not controlling; but, if it were, reversal would nevertheless be mandated because the government has complied with its basic requirements." App. A, p. 6. The court of appeals then noted that the government had, by letter of April 15, 1976, advised the school district that "additional steps were necessary to bring the district into compliance with federal law." had "pointed out . . . that the one-race, or predominantly one-race, status of twelve of the district's schools was the primary concern of the government," and had "explained . . . that the particular feeder pattern of elementary to junior high to senior

high schools used by the school district was the chief cause for these one-race schools." App. A, p. 6.

The court of appeals erred both in its statement of the district court's finding and in its interpretation of the Act. First, the court of appeals was obviously mistaken in finding that "No judicial ruling had been made concerning the attainment of a 'unitary' system." The district court's 1970 order explicitly provided that its purpose was "to establish a unitary school system in the South Park Independent School District" (App. C, p. 1), and the court in 1976 found that this order had been fully complied with by the school district. App. B, p. 7. As noted above, the district court could not have ruled in 1976 that a unitary system had not been established as of 1970 except by repudiating its 1970 order. The 1974 Act explicitly provides that its notice requirement applies to any order for the "modification of a court-approved plan" as well as to any order "for enforcement of a plan." There is, therefore, no basis for the court of appeals" conclusion that "the statute is not controlling."

Second, the effect of the court of appeals' interpretation of the notice requirement of the Act is to reduce it to a nullity. The Act required the government to provide the school district with "notice of the details of the *violation*" alleged (emphasis supplied). It would seem to be beyond dispute that this requirement was not complied with by the government's statement in its April 15, 1976 letter that "additional steps need to be taken in order to bring the district into compliance with federal law." It was no more complied with by the government's statements that "we refer to the continued operation" of twelve named schools "as one-race or predominantly one-race facilities" and that "this situation continues to exist, at least in part, as the result" of feeder patterns.

The requirement of the Act is that the school district be provided notice of the details of a violation of the Constitution, of those protected rights referred to in the Act: a denial of equal educational opportunity or a denial of equal protection of the laws, the Act; the continued existence of one-race or predominantly one-race schools is clearly *not* a violation of either.

Finally, the government's reference to feeder patterns obviously adds nothing. The racial composition of secondary schools is always due to the racial composition of their feeder schools, but this, again, says nothing of a possible violation absent any allegation or notification that the feeder patterns were unconstitutionally established; that the feeder schools were themselves unconstitutionally segregated; or that the continued existence of either amounts to a *denial* of equal educational opportunity or of equal legal protection, and the government has made no such allegation.

In short, the government's letter of April 15, 1976 provided the school district with notice of nothing more than that some of its schools continued to be predominantly of one race, and subsequent pleadings have contained no allegation of the sort of constitutional denial referred to in the Act. As the existence of such schools is not a violation of the Constitution or of the Act, the district court was clearly correct in holding that the Act's requirement of notice of "the details of the violation" had not been complied with. The court of appeals erred in reversing that holding.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WELLS, PEYTON, DUNCAN, BEARD, GREENBERG, HUNT AND CRAWFORD

By: .....

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PROOF OF SERVICE

I, Tanner T. Hunt, Jr., hereby certify that I have served three (3) copies of the foregoing Petition for Certiorari on counsel for Respondents, as provided in Rule 33, by depositing same in the United States mail on April 13, 1978, addressed to Judge Wade H. McCree, Jr., the Solicitor General, Department of Justice, Washington, D.C. 20530; Hon. Mark L. Gross, Hon. William C. Graves, and Hon. Drew S. Days III, Department of Justice, Washington, D.C. 20530; and on counsel for Intervenors, Hon. Joe H. Tonahill, P. O. Box 670, Jasper, Texas 75951, and Hon. R. Leon Pettis, Goodhue Building, Beaumont, Texas 77701.

.....

Tanner T. Hunt, Jr.
Counsel of Record

[1221]

APPENDIX A

U.S. v. SOUTH PARK INDEPENDENT SCHOOL DIST.

Cite as 566 F.2d 1221 (1978)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
SOUTH PARK INDEPENDENT
SCHOOL DISTRICT ET AL.,
Defendants-Appellees.

Nos. 76-3669, 77-2872.
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
Jan. 23, 1978.

Appeal was taken from orders of the United States District Court for the Eastern District of Texas, at Beaumont, Joe J. Fisher, Chief Judge, denying motion of the United States for supplemental relief requesting district court to adopt a new plan of student desegregation in school district and denying Government's application for an order to show cause why school district should not comply with earlier desegregation order, allegedly violated in the reassignment of principals. The Court of Appeals, Fay, Circuit Judge, held that: (1) where district court's holding that school district was a "unitary" school system was not detail enough to show whether existence of primarily one-race schools within district was result of present or past discriminatory action, remand was required for supplemental findings, and (2) where predominantly black schools in district had black

principals and the other schools had white principals, there facially appeared to be an unconstitutional assignment of principals, and specific findings of fact were necessary to support conclusion that reassignment of principals was done without regard to the race of the individuals involved.

Reversed and remanded.

1. Schools and School Districts — 13

Once finding is made that school district has a "unitary" school system, federal

court loses its power to remedy lingering vestiges of past discrimination absent a showing that either the school authorities or the state have deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools.

2. Schools and School Districts — 13

Where, under 1970 desegregation order, district court retained jurisdiction of school system and no finding had ever been made as to the attainment of a "unitary" system by the school district, case remained "active" under the district court's jurisdiction, and the parties were bound by intervening opinions of the Court of Appeals and the United States Supreme Court.

3. Federal Courts — 941

Where district court's holding that school district was a "unitary" school system was not detailed enough to show whether existence of primarily one-race schools within the

district was result of present or past discriminatory action, remand was required for supplemental findings.

4. Schools and School Districts — 13

Where district court had previously assumed and retained jurisdiction over school system and no judicial ruling had been made concerning attainment of a "unitary" system, and case had not been closed, statute providing that before any court shall enter an order for enforcement of modification of court-approved desegregation plan, the local educational agency should be provided with notice of details of violation and given reasonable opportunity to develop a remedial plan was not controlling. Equal Educational Opportunities Act of 1974, § 259, 20 U.S.C.A. § 1758.

5. Schools and School Districts — 13

In school desegration case, Government complied with the basic requirements of statute providing that before any court shall enter an order for the enforcement or modification of any court-approved desegregation plan, the local educational agency shall be provided with notice of the details of the violation and given a reasonable opportunity to develop a remedial plan. Equal Educational Opportunities Act of 1974, § 259, 20 U.S.C.A. § 1758.

6. Schools and School Districts — 141(1)

Assignment of principals alone is not necessarily the important factor, and one must look at racial composition of school district's entire staff, but it would be unconstitutional for a school district to assign principalships based on the race of the individuals involved.

7. Schools and School Districts — 141(1)

Where predominantly black schools in district had black principals and the other schools had white principals, there

facially appeared to be an unconstitutional assignment of principals, and specific findings of fact were necessary to support conclusion that reassignment of principals was done without regard to the race of the individuals involved.

Alexander C. Ross, Thomas M. Keeling, Daniel L. Jennings, U.S. Dept. of Justice, Washington, D.C., John H. Hannah, Jr., U.S. Atty., Tyler, Tex., J. Stanley Pottinger, Brian K. Landsberg, William C. Graves, Mark L. Gross, Attys., Appellate Section, Civil Rights Div., U.S. Dept. of Justice, Washington, D.C., Daniel J. McNulty, Asst. U.S. Atty., Beaumont, Tex., Drew S. Days, III, Asst. Atty. Gen., Frank D. Allen, Jr., Atty., Washington, D.C. for plaintiff-appellant.

John L. Hill, Atty. Gen., Pat Bailey, Asst. Atty. Gen., Austin, Tex., for Texas Educ. Agency et al.

Tanner T. Hunt, Jr., Beaumont, Tex., for South Park Ind. Sch. Dist.

Joe H. Tonahill, Jasper, Tex., for Parents & Students.

R. Leon Pettis, Beaumont, Tex., for defendants-appellees.

Appeals from the United States District Court for the Eastern District of Texas.

Before COLEMAN, TJOFLAT AND FAY, Circuit Judges.

[1223]

U.S. v. SOUTH PARK INDEPENDENT SCHOOL DISTRICT
Cite as 566 F.2d 1221 (1978)

FAY, Circuit Judge:

The questions before us today deal with the attempts of the South Park Independent School District (SPISD) to

desegregate their school system. The government contends that a 1970 desegregation plan ordered by the district court and implemented by the SPISD is not having its intended results, and, consequently, further remedial steps should be taken. The district court rejected this argument, and in the process ruled that the SPISD is a "unitary" school system. We reverse the ruling of the district court and remand for further findings of facts.

I. PROCEDURAL HISTORY

The history of the two cases currently on appeal begins on August 31, 1970, when the United States District Court for the Eastern District of Texas entered an order implementing a school integration plan. The order provided for the desegregation of students under a neighborhood school plan by means of attendance zones encompassing three high schools, four junior high schools, and eleven elementary schools. The order established as the only general exception to the neighborhood school assignment system a majority-to-minority transfer policy wherein a student attending a school in which his race is in the majority may elect to attend another district school in which his race is in the minority.[1] The order also provided for the desegregation of faculty and staff of the district in such a way as to provide a ratio of black teachers and staff to white teachers and staff in each district school that would be substantially the same as the then existing district-wide racial ratio of faculty and staff — allowing a five percent tolerance factor. This order of the district court became final without appeal.

[1] Students electing majority-to-minority transfer were to be given transportation if they desire it (assuming the same is available from district-controlled sources.) Also, such transferees were to be given priority for space in any district school to which they elect to transfer — not merely at the next closest district school at which their race was in the minority.

On July 19, 1976, the United States filed a Motion for Supplementary Relief which requested the district court to adopt a new plan of student desegregation. Statistics reflected that four schools which had been designated for black students under the dual system[2] had been continuously attended solely by black students. In addition, the government statistics showed that seven schools which were all white under the dual system remained virtually all white. In sum, the government statistics pointed out that during the 1975-1976 school term 75.1% of all black students in the system attended schools that were 92% or more black and 77.5% of all white students attended schools which were 86% or more white.

On July 29, 1976, the school district filed a reply to the Government's motion urging several reasons for denial of the motion. Their argument was primarily that the school district had remained in full compliance with the 1970 order; that agencies of the United States had consistently approved the school district's implementation of that order since its entry; that desegregative results differing in any way from those anticipated in 1970 were the result of changed residential patterns beyond the control of the school district; and that since 1970 the school district had taken no affirmative action with segregative intent, nor refrained from taking any action within the scope of the court order which, if taken, would have increased desegregative results.

The first appeal before us revolves around the district court's order of September 16, 1976, denying the United States' motion. The court set forth two reasons for its

[2] Until the late 1950s, the South Park Independent School System unconstitutionally operated pursuant to a Texas law a dual school system which required black and white students and faculty assigned to separate schools.

denial. First, the government failed to satisfy the requirements of 20 U.S.C. § 1758 with respect to providing notice to the school district of the details of any violation of equal educational opportunity or of equal protection of law.[3] Therefore, the defendant had not been given a reasonable opportunity to develop a voluntary remedial integration plan with time for community participation therein. The second reason the court proffered was that independent of § 1758 there still existed no basis for relief since the 1970 plan had desegregated the school district thereby dissolving all vestiges of a dual school system. By so ruling, the district court in effect said that the South Park Independent School District was a "unitary" school system.

The second appeal which we are to review centers around the denial of the government's application of August 8, 1977 for an order to show cause why the defendants should not comply with the August 31, 1970 order. This application alleged that the school board had reassigned its principals

[3] 20 U.S.C. § 1758 provides:

Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.

for the 1977-78 school year in a racially discriminatory manner in violation of the 1970 order. The government provided statistics showing that in the 1976-77 school year the race of the principals in each of the school district's seventeen schools was in all instances the race of the majority of students. Each of the five black principals in the district was assigned to one of the five schools attended exclusively or predominately by black students. All the rest of the schools had white majorities in student attendance, and each had a white principal.

The school district took the position that the principal assignments of 1977-78 did not alter the desegregation of faculty and staff in any school building; that no district school was identifiable as one intended solely for black students or white students as a result of such principal reassignment; that the principal reassignments were not racially motivated; and that such assignments were not violative of the 1970 order.

On August 16, 1977, the district court entered an order denying the government's application for a show cause order. The court found that the school district had acted in compliance with the 1970 order because the reassignment of principals did not alter the racial composition of the entire staff of any school so as to indicate that a particular school is intended for black students or white students. Further, the district court held that the reassignments does not in any way result in less integration of staff members.

II. THE STUDENT CASE

The government's first appeal contests the propriety of the district court's denial of its motion for the implementation of a new school desegregation plan. In denying the government's motion, the district court ruled that the gov-

ernment had failed to follow the procedural steps mandated by 20 U.S.C. § 1758, and, in the alternative, that further relief was unnecessary because the South Park Independent School District had become a unitary school system.

[1, 2] Initially, we shall discuss the court's holding that the SPISD is a "unitary" school system. This finding is critical because once it is made a federal court loses its power to remedy the lingering vestiges of past discrimination absent a showing that either the school authorities or the state had deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools. *Swann* v. *Board of Education*, 402 U.S. 1, 32, 91 S.Ct. 1267, 1284, 28 L.Ed.2d 554 (1971).[4] Even

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though the Supreme Court's decision in *Swann* was rendered subsequent to the 1970 desegregation plan, it nevertheless controls the disposition of this case. To understand

[4] The Supreme Court also said in *Swann* that:

> It does not follow that the communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school auhorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

402 U.S. at 31-32, 91 S.Ct. at 1283-84. This point was reemphasized in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (June 28, 1976), when the Supreme Court stated:

> For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Id. at 436-37, 96 S.Ct. at 2705.

fully why this is so, one must keep in mind that under the original 1970 order the district court retained jurisdiction over the South Park school system (this retention of jurisdiction was a normal and necessary procedure taken to insure the implementation of the plan and the achievement of the goal — a "unitary" school system). At no time prior to the 1976 order presently under attack, had a finding been made by the district court as to the attainment of a "unitary" system by the SPISD. Thus, the case remained "active" under the district court's jurisdiction. Given these circumstances, the parties are bound by intervening opinions of the Court of Appeals and the United States Supreme Court, and there have been many such opinions outlining "new guidelines and requirements" in certain situations.

The present posture of this case is that we must review the 1976 order and determine if it is in accord with the mandate of *Swann*. The Supreme Court said in *Swann* that the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. *Id.* at 24, 91 S.Ct. 1280. However, the Court was very careful to point out that situations justifying one-race schools are rare and must be carefully scrutinized.

> [I]t should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria

> of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Id, at 26, 91 S.Ct. at 1281.

[3] In allowing the existence of one-race schools in limited situations, the *Swann* opinion emphasized that findings should be made demonstrating that their existence is not the result of present or past discriminatory action. The district court's holding that the SPISD is a "unitary" school system is not detailed enough to show us whether or not the school system meets this *Swann* requirement. For this reason, it is necessary to remand this case to the district court for supplemental findings of fact in order to determine whether or not the SPISD is in fact a "unitary" school system.

[4, 5] The district court also denied the government's motion for implementation of a new desegregation plan because the government failed to follow the requirements of 20 U.S.C. § 1758. Section 1758 provides that before any court shall enter an order for the enforcement or modification of any court-approved desegregation plan, the local educational agency should be provided with notice of the

details of the violation and given a reasonable opportunity to develop a remedial plan. We reject the district court's application of § 1758. The district court had previously assumed and retained jurisdiction over the school system. No judicial ruling had been made concerning the attainment of a "unitary" system. The case had not been closed. Under the facts of this case, the statute is not controlling; but, if it were, reversal would nevertheless be mandated because the government has complied with its basic requirements. In a letter dated April 15, 1976, the Department of Justice wrote to counsel for the school district advising that the Department felt additional steps were necessary to bring the district into compliance with federal law. (R. 103-106). The Department pointed out in this letter that the one-race, or predominately one-race, status of twelve of the district's schools was the primary concern of the government. The letter also explained that the Department of Justice felt that the particular feeder pattern of elementary to junior high to senior high schools used by the school district was the chief cause for these one-race schools. Furthermore, the letter explained that the Department was writing in order to state the reasons it felt the SPISD was not in compliance with federal law and to afford the Board of Education an opportunity to remedy the situation. A motion for supplemental relief was not filed until after the Department of Justice had received a response from the school district explaining that a significantly greater amount of time was needed to develop a new desegregation plan. We are unable to see how the government could have better complied with the notice provisions of the statute, and, therefore, the district court's denial of the government's motion on these grounds was error.

III. THE PRINCIPAL REASSIGNMENT CASE

In the principal reassignment case, the government has

brought forth statistics from which one could infer that the principal assignments were based upon the race of the individuals involved. The school district of course denies this inference. The district court apparently treated either the government's motion or the defendant's response to it as a motion for summary judgment, and, without a hearing, denied the government's motion.

[6] We feel compelled to reverse the entry of the summary judgment, but, in so doing, we recognize that the assignment of principals alone is not necessarily the important factor but rather one must look at the racial composition of a school district's entire staff. We are not ready to hold that each particular level of employment in a school system must have a particular racial composition. At the same time, however, we also recognize that in a community individuals might attach a certain degree of importance to the position of principal, and that it would be unconstitutional for a school district to assign principalships based upon the race of the individuals involved. In *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1970), this court explained:

> Staff members who work directly with children, and professional staff who work on the administrative level will be hired, *assigned*, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

Id. at 1218 (emphasis added).

[7] We are not presently in a position to find that the SPISD is assigning principals in a manner violative of the constitution, but we do feel it is necessary to reverse the entry of the summary judgment. The district court's order lacks the necessary findings of facts justifying what would facially appear to be the unconstitutional assignment of

principals based upon race. We remand the case to the district court for specific findings of facts, if such exist, supporting the court's conclusion that the reassignment of principals was done without regard to the race of the individuals involved.

IV. CONCLUSION

In conclusion, we want to point out that we do not view these cases as a situation where a district court has refused to rule, or as a situation where we need implement our own desegregation plan for the school district. We recognize that the issues involved are extremely difficult, and that the ultimate solutions will affect the lives of most individuals living within the communities involved. The district judge is a very learned, able, and conscientious judge, and is fully capable of handling these matters.

Reversed and Remanded.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT

Defendant.

CIVIL ACTION No. 6819

ORDER

On August 31, 1970, this Court entered an order for implementation of a school integration plan in the cause above numbered and styled. Such order provided for the immediate desegregation of students under a comprehensive neighborhood school plan by means of specific attendance zones encompassing three high schools, four junior high schools, and eleven elementary schools.

The order also established, as the only "general exception" to the neighborhood school assignment system, a majority-to-minority transfer policy, wherein a student attending a school in which his race was in the majority could elect to attend another district school in which his race was in the minority. Students electing such transfer were to be given transportation if they desired it, assuming the same was available from district-controlled sources. Further, such transferees were to be given priority for space in any district school to which they elected to transfer under the majority-to-minority exception, not merely in the next closest district school at which their race was in the minority.

Finally, the order provided for the immediate desegregation of faculty and staff of the district in such a way as to assure that the ratios of black teachers and staff to white teachers and staff in each district school would be substantially the same as the then existing district-wide racial ratio of faculty and staff, allowing a five percent tolerance factor.

The order of the Court filed August 31, 1970, became final without appeal.

By letter of April 15, 1976, the Department of Justice wrote to counsel for the school district advising that, in the opinion of that office, "additional steps need to be taken in order to bring the district into compliance with Federal law." The Department of Justice requested that such "additional steps" — otherwise unspecified — be implemented with the beginning of the 1976-77 academic school year. Such letter contained the first indication of dissatisfaction by an agency of plaintiff since entry of the order on August 31, 1970.

Following a preliminary study of the educational and economic effects of attempting to implement a comprehensive new plan of student integration in the 1976-77 academic school year, counsel for the school district, at the direction of its board of trustees, wrote to the Department of Justice by letter of June 24, 1976, pointing out that full consideration and implementation of an acceptable alternate plan for student integration could not be accomplished in the brief time remaining without seriously disrupting the district's educational program for academic school year 1976-77. However, the board proposed a timetable wherein it would determine, by February 15, 1977, the most educationally sound and economically feasible plan for accomplishing student integration in the district, which plan would be implemented with the beginning of academic school year 1977.

The Department of Justice made no direct response to defendant's letter of June 24, 1976. However, on July 19, 1976, plaintiff filed a motion for supplementary relief, with memorandum attached, seeking entry of order requiring defendant to "develop, adopt and implement a comprehensive school desegregation plan" — again unspecified. As in the initial proceedings, this Court has jurisdiction of the parties and over the subject matter of this litigation.

On July 29, 1976, defendant filed reply, with memorandum attached, to plaintiff's motion, praying that such motion be in all things denied, on the grounds that plaintiff's motion was not predicated on current information pertaining to student integration in the district; that the district has been in full compliance with the Court's order of August 31, 1970, since date of entry, which order carried plaintiff's approval; that plaintiff had consistently approved defendant's implementation of that order since its entry; that desegregative results, if any differing from those anticipated in 1970 were the result of changed residential patterns beyond defendant's control; that since 1970 defendant has taken no affirmative action with segregative intent, nor refrained from taking any action within the scope of the order which, if taken, would have increased desegregative results; and that the 1970 order promulgated the most educationally sound and constitutionally acceptable student integration plan presently available to defendant.

In the alternative, defendant's reply prayed that, in the event the Court found merit in plaintiff's motion for supplementary relief, defendant would be permitted to defer implementation of any new student integration plan until the beginning of academic school year 1977-78. Defendant's memorandum contained several reasons in support of its alternative plea.

Simultaneously with its reply, defendant filed request for oral hearing in order to adduce evidence by testimony in open court. By date of August 5, 1976, this Court entered order granting defendant's request for oral hearing and setting the same for August 16, 1976.

On August 11, 1976, motion to intervene as interested parties, together with complaint in intervention, was filed by counsel on behalf of certain named parents and students of defendant district, and of others similarly situated, which motion and complaint urged denial of plaintiff's motion on various grounds.

Hearing in open court was conducted on August 16, 1976. Counsel for the parties, including intervenors, argued their positions. The Court deferred ruling on plaintiff's motion until plaintiff had been given an opportunity to amend its motion.

On August 17, 1976, plaintiff filed its opposition to the motion to intervene, as well as its amended motion for supplementary relief, with memorandum attached. On that same day, intervenors filed a supplementary motion to intervene. Plaintiff's amended motion no longer sought relief to be effective with the beginning of the 1976-77 academic school year, but, rather, with the beginning of the Spring Term 1977.

On August 19, 1976, hearing on plaintiff's motion was reconvened. Additional arguments by counsel were heard, as was the testimony of several witnesses called by defendant. Neither plaintiff nor intervenors offered witnesses.

After a consideration of the foregoing, the Court finds that defendant district has not been provided notice of the details of any violation of equal educational opportunity or of equal protection of law, and further that plaintiff

has neither alleged nor proved specific instances or examples of denial of these rights to any person by defendant district. Without such notice defendant has not been permitted sufficient opportunity for community participation in the development of a remedial student integration plan as sought by plaintiff.

The Court further finds that defendant district has fully complied with this Court's order of August 31, 1970, from date of entry to the present.

The Department of Health, Education and Welfare, an agency of plaintiff charged with such responsibility, has approved student integration procedures in defendant district in each academic school year from entry of the Court's order to the present, and prospectively, for academic school year 1977-78.

While specific desegregative effects anticipated at the time of entry of the Court's order in August, 1970 may not have been fully realized, nonetheless, the overall, district-wide desegregative effects of that order have been greater than were anticipated. The desegregative results differing from those anticipated in 1970 have been the result of shifting residential patterns, attendance of some district students at private schools, and other factors beyond the control of defendant, particularly in the Hebert High School and Odom Junior High School neighborhood attendance zones.

Since entry of this Court's order of August 31, 1970, defendant district has taken no affirmative action with segregative action within the scope of such order which, if taken, would have increased desegregative results. Student assignments to individual classes at South Park High School and in the other schools of defendant district have consistently been made without regard to race, color or

national origin, and the method of student class assignment employed by defendant has had a definite desegregative effect.

No state agency has attempted to alter the residential or demographic patterns affecting the neighborhood attendance plan set forth in that order since entry of the 1970 order.

In each academic year since entry of the 1970 order, student enrollment district-wide has consistently declined. Further, during that six-year interval the percentage of black students enrolled in defendant district has increased from about thirty-three percent to about forty percent.

Plaintiff has failed to satisfy the requirements of 20 U.S.C.A. 1758 with respect to providing notice to defendant district of the details of any violation of equal educational opportunity or of equal protection of law. Thus, defendant has not been given a reasonable opportunity to develop a voluntary remedial integration plan with time for community participation therein. Accordingly, this Court is prohibited under the provisions of 20 U.S.C.A. 1758 from granting plaintiff's motion for supplementary relief.

Further, the Court's order of August 31, 1970, desegregated the South Park Independent School District, thereby dissolving all vestiges of a dual school system. The resultant and now existing unitary system complies with the constitutional requirements enunciated in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

No action, or inaction, by defendant district since entry of this Court's order on August 31, 1970, has had, as a natural and foreseeable consequence, a segregative effect on student integration. Therefore, no further action by this Court is required. *Pasadena City Board of Education* v. *Spangler,* ..... U.S. ..... (1976); *Stout* v. *Jefferson County*

Board of Education, ...F. 2d ....., (5th Cir. 1976, No. 75-2978).

Plaintiff has failed to establish that the integration order entered by this Court on August 31, 1970, is constitutionally flawed. Thus, the Court hereby reaffirms the constitutionality of that order and must direct defendant district to continue to comply with such order in all particulars.

It is accordingly ORDERED, ADJUDGED and DECREED that plaintiff's Motion for Supplementary Relief, as amended, be, and the same is hereby DENIED.

RENDERED this the 19th day of August, 1976.

/s/ Joe J. Fisher
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT
Defendant.

CIVIL ACTION No. 6819

ORDER FOR IMPLEMENTATION OF SCHOOL INTEGRATION PLAN

The Court having heard testimony in open hearing and having considered the arguments of counsel for the United States of America and for Defendant South Park Independent School District with respect to the immediate implementation of a school integration plan designed to establish a unitary school system in South Park Independent School District,

It is ordered that the Board of Trustees of South Park Independent School District proceed to implement, not later than September 2, 1970, the following segregation plan:

DESEGREGATION OF STUDENTS

The neighborhood School Plan submitted by the district is hereby adopted by the Court, with certain modifications designed to increase the overall percentage of integration

at particular schools while conforming more exactly to the appropriate capacities of those schools.

Senior High Schools:

1. Forest Park High School (grades 9-12) — All students in the district residing west of Interstate 10 will attend Forest Park High School.

2. Hebert High School (grades 9-12) — All students in the district residing east of Interstate 10 to the intersection of Washington Boulevard and Waco Street, and west of a line extending south on Waco Street to Southerland Street; east on Southerland Street to Marie Street; south on Marie Street to Rena Street; east on Rena Street to Opal Street; south on Opal Street to Virginia Street; west on Virginia Street to Beale Street; south on Beale Street and along a line due south across Loop 251 to an intersection with the Beaumont city limit line, and along a line due south to an intersecting point with the southermost boundary line of South Park Independent School District; all students whose residences face toward Opal Street within this school attendance area will attend South Park High School; all students whose residences face toward Beale Street within this attendance area will attend Hebert High School; all students whose residences are located on the west side of Waco and Marie Streets within this attendance area will attend Hebert High School; all students whose residences are located on the east side of Waco and Marie Streets within this attendance area will attend South Park High School; all students whose residences are located on the north side of Southerland, Virginia, and Rena Streets within this attendance area will attend South Park High School; all students whose residences are located on the south side of Southerland, Virginia and Rena Streets within this attendance area will attend Hebert High School.

3. South Park High School (grades 9-12) — All students in the district residing east of the Hebert High School attendance line, including Hildebrandt Road and the Cardinal Meadows addition, will attend South Park High School.

Junior High Schools:

1. Memorial Junior High School (grades 6-8) — All students in the district residing within the following described area will attend Memorial Junior High School: All students in Grades 6, 7 and 8 who live in the area described as beginning at Calder Avenue and the District's eastern line, proceeding west on Calder Avenue to Dowlin Road, then north on Dowlin Road to Ivanhoe, extending Ivanhoe west slightly northwest of Evangeline Drive to intersection with Major Drive, proceeding north on Major Drive to the South Park Independent School District district line, including all who live on Major Drive; the east and south boundary line of this area shall be Interstate 10.

2. Marshall Junior High School (grades 6-8) — All students in the district residing north of the boundary line describing the Memorial Junior High School attendance area will attend Marshall Junior High School.

3. Odom Junior High School (grades 6-8) — All students in the district residing within the Hebert High School attendance area described above will attend Odom Junior High School.

4. MacArthur Junior High School (grades 7-8) — All students in the district residing within the South Park High School attendance area described above will attend MacArthur Junior High School.

Elementary Schools:

1. West Oakland Elementary School (grades 1-5) — All students in the district residing within an area described

as beginning at Washington Boulevard and south on Fannett Road to the Loop, then west and north on the Loop to where Roberts Avenue would intersect, then east on Roberts Avenue to Fourth Street, south on Fourth Street to the point of beginning, will attend West Oakland Elementary School. All 6th grade students in this attendance area will attend Fehl Elementary School.

2. Fehl Elementary School (grades 1-6) — All students in the district residing within the area bounded by Roberts Avenue, Interstate Highway 10, T.&N.O. Railroad tracks and Fourth Street will attend Fehl Elementary School.

3. Caldwood Elementary School (grades 1-5) — All students in the district residing within the area described as beginning at the point where Interstate 10 crosses the T.&N.O. railroad tracks and proceeding south on Interstate 10 to the Caldwood cutoff, following Caldwood cutoff west and north to Hooks Street, following Hooks Street east and north to the District boundary line, said area to include all of Ida Reed Addition, will attend Caldwood Elementary School.

4. Sallie Curtis Elementary School (grades 1-5) — All students in the district residing within the area described as beginning at Calder Avenue at the point where it intersects the Caldwood cutoff, proceeding west on Calder to Dowlin Road, then proceeding on Dowlin Road to Prutzman Road, then west on Prutzman to Shakespeare, then due north to Gladys, then east on Gladys to Central Drive, which is the east boundary line of the school district, said attendance zone to include all students living in Audubon Place, and on Sheridan, Candlestick and Fenwich Streets, will attend Sallie Curtis Elementary School.

5. Regina-Howell Elementary School (grades 1-5) — All students in the district residing within the area north

of the northern boundary line of the Sallie Curtis attendance area and east of Dowlin Road to the school district line will attend Regina-Howell Elementary School.

6. Amelia Elementary School (grades 1-5) — All students in the district residing in an attendance zone identified so as to include all areas west of the previously described elementary attendance zones and to the school district boundary line, south to Walden Road and to include Walden Road, will attend the Amelia Elementary School.

7. Tyrrell Park Elementary School (grades 1-6) — All students in the district residing in the area lying west of the Bingman Elementary School neighborhood boundary line and south of Loop 251 and Interstate 10 and Walden Road, but not including Walden Road, will attend Tyrrell Park Elementary School.

8. Giles Elementary School (grades 1-6) — All students in the district residing in the area described as beginning at the intersection of the T.&N.O. railroad tracks and Washington Boulevard, proceeding east on Washington Boulevard to Highland Avenue, then south on Highland to Elgie Street, west on Elgie to Kenneth Street, south on Kenneth to Brockman Street, west on Brockman to Ector Street, south on Ector to Essex Street, west on Essex to the T.&N.O. railroad tracks, north on the T.&N.O. railroad tracks to the point of beginning, will attend Giles Elementary School.

9. Pietzsch Elementary School (grades 1-6) — All students in the district residing in the area described as beginning at the Neches River, at the South Park school district line, and proceeding south along Sycamore Street to KCS railroad tracks, then west to the intersection of Port Arthur Highway and Highland Avenue, along Highland south to Elgie Street, west on Elgie to Kenneth Street, south on

Kenneth to Brockman Street, west on Brockman to Ector Street, south on Ector to Essex Street, west on Essex to the T.&N.O. Railroad tracks, south on the T.&N.O. railroad to Virginia Street, east on Virginia to Kenneth Street, south on Kenneth to Shell Street, east on Shell (which street later becomes Alabama Street), and then east to a point beyond the Port Arthur Highway to the eastern boundary line of the South Park School District, will attend Pietzsch Elementary School.

10. Bingman Elementary School (grades 1-6) — All students in the district residing in the area described as south of the Pietzsch Elementary School boundary line and east of the Blanchette Elementary School boundary line, hereinafter described, and bounded on the north by Shell, Alabama, Virginia and Kenneth Streets, bounded on the west by Flamingo Street extended to Florida Street, east on Florida to City of Beaumont limit line, south to the South Park school district boundary line, including all of Hilderbrandt Road, then east to the eastern boundary line of the South Park Independent School District, will attend Bingman Elementary School.

11. Blanchette Elementary School (grades 1-4) — All students in the district residing in the area described as beginning at the Fannett Road and Washington Boulevard, south along Fannett Road to Loop 251, east on Loop 251 to Florida Street, east on Florida to a point directly south of Flamingo, from that point north to Florida and Virginia, east on Virginia to the T.&N.O. railroad tracks, north on the T.&N.O. railroad tracks to Washington, west on Washington to the point of beginning, will attend Blanchette Elementary School. All 5th grade students residing within the Blanchette attendance area will attend either Caldwood, Curtis, Regina-Howell or Amelia schools, as the school district shall direct.

Majority-to-Minority Transfer Policy:

The only general exception to the neighborhood school assignment system shall be the majority-to-minority transfer policy as defined by recent appellate decisions. That is, the school district shall permit a student attending a school in which his race is in the majority to choose to attend another district school in which his race is in the minority. Moreover, all students so transferring shall be given transportation, if they desire it, assuming such transportation is available from district-controlled sources. Further, such transferees must be given priority for space at any district school to which they elect to transfer, not merely at the next closest school in which their race is in the minority.

Graduating Seniors:

Inasmuch as this litigation was initiated only a short time prior to the beginning of the Fall school term and because of the inconvenience and expense to parents whose children will be high school seniors in the 1970-71 school year, the single special exception to the neighborhood school assignment system will be to allow all students who will be graduating seniors in the 1970-71 school term to elect to attend the district high school which they attended at the conclusion of the 1969-70 school term. This special exception will also apply to residents of other school districts whose children attended South Park district high schools at the conclusion of the 1969-70 term; who will be seniors in South Park district high schools in the 1970-71 term; and who had completed all necessary transfer requirements into South Park district prior to June 1, 1970.

DESEGREGATION OF FACULTY AND STAFF

All principals, assistant principals, teachers, teacher aids, coaches and other staff who work directly with students in one of the district schools on a day-to-day basis shall be

assigned so that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. For the 1970-71 school year South Park Independent School District will assign its staff as described above so that the ratios of black to white teachers and staff in each district school are substantially the same as the present district-wide ratio of faculty and staff, allowing a five (5%) per cent tolerance factor. Moreover, in the event special certification requirements at the senior high school level make it impossible to meet this ratio test with the present faculty, the school district will in the course of employing new teachers during the school year act so as to correct any deviations presently existing with respect to such ratio.

/s/ JOE J. FISHER
United States District Judge

Date: August 31, 1970.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
February 23, 1978

TO ALL PARTIES LISTED BELOW:

NO. 76-3669 — U.S.A. v. SOUTH PARK INDEPENDENT SCHOOL DISTRICT, ET AL.

Dear Counsel:
This is to advise that an order has this day been entered denying the petition( ) for rehearing**and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Brenda M. Hauck
Deputy Clerk

**on behalf of appellees, South Park Indep. School Dist., bmh

cc: Messrs. Brian K. Landsberg
William C. Graves
Mr. Mark L. Gross
Mr. Tanner T. Hunt, Jr.
Mr. Joe H. Tonahill
Mr. Leon Pettis

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3669

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

ORDER

( ) The motion of ..... for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellees for recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including April 17, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

PETER FAY
United States Circuit Judge

APPENDIX F

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 76-3669

UNITED STATES OF AMERICA

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, ET AL

NOTICE OF APPEAL BY APPELLEE TO THE SUPREME COURT OF THE UNITED STATES

COMES Now South Park Independent School District, Appellee herein, and would show unto the Court that:

I.

Appellee has heretofore filed with this Court its motion for recall and stay of mandate, stating its intention to file application for writ of certiorari to the United States Supreme Court. Appellee's motion was granted by this Court.

II.

In addition, in accordance with Rule 10, Rules of the Supreme Court of the United States, Appellee hereby gives formal notice of appeal to the United States Supreme Court from final judgment entered by this Court on January 23, 1978; on February 23, 1978, this Court denied Appellee's petition for rehearing and its suggestion for en banc consideration.

III.

This appeal is taken pursuant to 28 U.S.C. 1254(1).

IV.

The clerk of this Court is requested to prepare a transcript of the entire record in this cause, to certify the same, and to transmit it to the clerk of the U.S. Supreme Court.

V.

The following points are presented by this appeal:

1. The U.S. Court of Appeals erred in reversing the finding of the U.S. District Court that it had no jurisdiction in the case because appellant failed to comply with the requirements of 20 U.S.C. 1758.

2. The U.S. Court of Appeals erred in reversing the finding of the U.S. District Court that appellee had established a unitary system by its compliance with the court-ordered desegregation plan of 1970, and requiring that the U.S. District Court conduct additional hearings and make supplemental findings in support of that conclusion.

VI.

The following decisions by the U.S. Supreme Court, among others, support appellee's positions on these points:

1. *Austin Independent School District* v. *United States*, 429 U.S. 990 (1977);

2. *Dayton Board of Education* v. *Brinkman*, ... U.S. ..... 197 S.Ct. 2766 (1977);

3. *Washington* v. *Davis*, 426 U.S. 229 (1976);

4. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

WHEREFORE, PREMISES CONSIDERED, Appellee prays that it be found to have complied with appropriate Federal statutes and with the rules of the U.S. Supreme Court in submitting its notice of appeal.

Respectfully submitted,

WELLS, PEYTON, DUNCAN, BEARD, GREENSBERG, HUNT AND CRAWFORD

By: /s/ TANNER T. HUNT, JR.

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Attorneys for Appellee
South Park Independent
School District

CERTIFICATE OF SERVICE

I hereby certify that the foregoing notice of appeal was served by mailing copies, postage prepaid, to:

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This 4th day of April, 1978.

/s/ Tanner T. Hunt

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